Filed 3/5/19 Beitler v. Bral CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BARRY A. BEITLER, Plaintiff and Respondent, v. JOHN BRAL, Defendant and Appellant.	B279951 (Los Angeles County Super. Ct. No. BC532523)

APPEAL from a judgment of the Superior Court of Los Angeles County. Barbara Ann Meiers, Judge. Reversed.

Shulman Hodges & Bastian, Ronald S. Hodges, Gary A. Pemberton, Alan J. Friedman, and Brianna L. Frazier for Defendant and Appellant.

Levy, Small & Lallas, Tom Lallas and Mark D. Hurwitz for Plaintiff and Respondent.

The trial court entered a default judgment in excess of $2.5 million in favor of respondent Barry A. Beitler (Beitler) and against appellant John Bral (Bral) as a sanction for Bral's failure to comply with an order to produce documents and appear for a fourth day of his deposition.

We reverse.

FACTS

The Complaint

Beitler sued Bral and alleged: They had joint interests in real estate through multiple limited liability companies. Bral failed to pay Beitler various amounts pertaining to expenses and sums due on loans.

The complaint alleged 21 causes of action.

Notice of Deposition; Bral's Failure to Appear; Ex Parte Application to Compel Bral's Deposition; Related Orders

Beitler noticed Bral's deposition for December 1, 2015. Bral did not appear. In response, Beitler filed an ex parte application to compel Bral's appearance. The trial court granted the application and ordered Bral to appear for his deposition on December 8, 2015. Subsequently, the trial court vacated the order and directed the parties to resolve their discovery disputes through properly noticed motions after meeting and conferring.

First Motion to Compel Bral's Deposition; Related Order

Beitler filed a motion to compel Bral to appear for his deposition and produce documents.

On February 8, 2016, the trial court ordered Bral to appear at his deposition, which was to continue day-to-day until it was completed. In addition, he was ordered to produce all documents requested by Beitler.

Three Days of Deposition

Beitler's counsel took Bral's deposition from February 16 through February 18, 2016. Bral was represented by attorney Lloyd K. Chapman (Chapman) on two days and Matthew Hoesly (Hoesly) one day. On the middle day, Beitler's counsel and Hoesly agreed to put together a list of documents to be produced by Bral. On the last day, Beitler's counsel and Chapman discussed an agreement for Bral to produce documents that he had not produced when he appeared for his deposition. At one point, the following colloquy occurred:

"[BEITLER'S COUNSEL]: We will recess for the evening. We'll resume 9:30 a.m. on Wednesday, which is February 24[, 2016]. And Mr. Chapman and Mr. Bral will produce all documents Mr. Bral has agreed to produce already in the three sessions of the depositions that have not yet been produced by Monday.

"[BRAL]: Correct.

"[BEITLER'S COUNSEL]: And then we'll continue with the examination. . . ."

The Mandatory Settlement Conference

The trial court set a mandatory settlement conference (MSC) for April 25, 2016. Beitler submitted an MSC brief; Bral did not. On the morning of April 25, 2016, as Beitler's counsel was traveling to the courthouse, the trial court's clerk informed him that Chapman had taken the MSC off calendar, and that it would have to be reset.

Second Motion to Compel Bral's Deposition; Related Order; Discovery Sanctions

On April 28, 2016, Beitler filed a second motion to compel Bral's deposition.

According to a declaration filed by Beitler's counsel, it became clear during Bral's deposition in February 2016 that he had not produced many necessary documents, such as operational and financial records for the various limited liability companies. As unproduced documents were identified during the deposition, Bral and his counsel promised to produce them. Despite those promises, Bral did not produce the documents. Moreover, many of the documents he did produce were incomplete. For over a month, Beitler's counsel tried to resolve the matter informally. Though Bral's counsel agreed on several occasions to meet and confer by phone, he missed two phone appointments.

Beitler's counsel attached a letter to his declaration. The letter was addressed to Chapman and referenced documents that Hoesly promised to produce.

Bral did not file an opposition. Moreover, no attorney appeared on Bral's behalf.

On May 24, 2016, the trial court granted the unopposed motion to compel. Per the order, Bral was directed to appear for his deposition on June 22, 2016, and produce all documents previously requested. The trial court awarded $4,450 in sanctions against Bral and Chapman. The court clerk was directed to provide notice.

Sanctions for Bral's Failure to Appear at the MSC

Based on Beitler's ex parte application, the trial court sanctioned Chapman $2,500 for failing to appear at the MSC. The MSC was rescheduled.

Notice of Disassociation of Counsel

Chapman filed a notice on May 27, 2016, stating that he was disassociating as counsel of record for Bral.

Bral's Nonappearance at his Deposition

Bral failed to appear for his deposition on June 22, 2016. On the deposition record, Beitler's counsel stated the following: Bral and his counsel did not appear, they did not produce documents as required by the trial court's minute order, and they did not pay the sanctions.

Ex Parte Application for an Order Striking Bral's Answer and Entering his Default; Noticed Motion Seeking the Same Relief

Beitler filed an ex parte application to strike Bral's answer and enter his default. Subsequently, at the trial court's invitation, Beitler requested the same relief through a noticed motion.

Bral's Motion to Compel Beitler's Deposition

At a July 29, 2016, hearing on Bral's motion to compel Beitler's deposition, Bral was represented by Chapman as well as John Whelan (Whelan) of Samini Scheinberg, PC. The trial court referenced Beitler's motion to strike Bral's answer and enter his default. It then stated that there was no need to consider Bral's motion until Beitler's motion was considered. Whelan argued that Bral was entitled to compel Beitler's deposition, to which the trial court replied that it was Bral who was failing to complete his deposition and produce documents as ordered.

As for why Bral did not appear for his deposition on June 22, 2016, Chapman blamed it on a miscommunication between his office and Samini Scheinberg, PC.

Again referring to Beitler's motion, the trial court said to Chapman, "You can always sit down, use some common sense, get Mr. Bral's deposition and documents and everything taken care of, get Mr. Beitler's information discovered thereafter, and maybe there won't be anything for this court to look at [on the date of the hearing]. [¶] . . . None of this should be happening. I don't expect to see attorneys caught in a mess like this and having the court in the middle of it in the usual case, and I still think there's time for you all to sit down and get real with one another. [¶] . . . [¶] . . . And I do encourage you to resolve your differences. Get this discovery done. Get it done promptly. Get these motions off calendar, if you can, and take charge of your own case again—all right?—rather than having the court do it."

Opposition to the Motion for an Order Striking Bral's Answer and Entering his Default; the Hearing; Related Order

Chapman provided a declaration filed by the law firm of Samini Schenberg, PC as Bral's only opposition to the motion for an order striking Bral's answer and entering his default. According to Chapman, he had been diagnosed with a severe blood disorder[1] and had withdrawn as cocounsel. As a result, he did not attend the hearing on Beitler's second motion to compel Bral's deposition. In addition, Chapman declared, "Because I was now out of the case, I did not calendar the [new deposition date]. I was hospitalized at this time and did not see the court's minute

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[1] In the respondent's brief, Beitler indicates that Chapman is now deceased.

order nor an email from attorney Matthew Hoesly of the Samini firm stating that he presumed that I would be handling the deposition. No one informed Mr. Bral of the newly ordered deposition." Chapman ended his declaration by stating that Beitler did not send a notice or confirm the new deposition date, and that Bral's failure to appear "was totally due to an inadvertent communication error between counsel, and was not intentional."

A hearing was held on August 22, 2016. The trial court stated that "among the excuses for nonappearance the attorney representing Mr. Bral at that time had claimed he was ill and so on. [¶] But he was not the only attorney representing Mr. Bral at the time. As I understand it, he had co-counsel. And still the [trial court's] orders were not complied with. [¶] So, there would then be an order that [Beitler] has to . . . [p]rove this as a default case."

Whelan, who appeared on behalf of Bral, said, "My office made an error and did not coordinate and did not appear with Mr. Bral on June 22[, 2016]." Per Whelan, Bral's failure to comply with the trial court's orders was not willful. In response to that assertion, the trial court asked if there was a declaration from Bral. Whelan said there was not. The trial court stated, "If Mr. Bral was not willful and has his reasons and his excuses, I would expect to hear it from him." In rejoinder, Whelan stated he had offered Bral's availability for deposition, and he had requested that Beitler's counsel schedule it. Also, Whelan said the documents that were previously requested had been produced a week before the hearing. He added, "And Mr. Bral is ready, willing, and able to appear for deposition on a date and time and at a place that the [trial court] orders]."

Beitler's counsel did not dispute that Whelan had produced documents or offered Bral for deposition. Rather, Beitler's counsel stated that there was no evidence in the record of either of those things.

The trial court granted Beitler's motion. It ordered Bral's answer stricken, and it instructed Beitler to proceed with the case by default.

Judgment

Beitler submitted a request for default judgment. The trial court entered judgment in favor of Beitler and against Bral in the amount of $1,765,202 plus $749,429 in prejudgment interest.

This appeal followed.

DISCUSSION

Our discovery law permits a "range of penalties for a party's refusal to obey a discovery order, including monetary sanctions, evidentiary sanctions, issue sanctions, and terminating sanctions. [Citations.] A court has broad discretion in selecting the appropriate penalty, and we must uphold the court's determination absent an abuse of discretion. [Citation.]" (*Lopez v. Watchtower Bible & Tract Society of New York, Inc.* (2016) 246 Cal.App.4th 566, 604 (*Lopez*).) "In deciding whether the trial court's orders excluding evidence or its order terminating the action as a sanction for misconduct constituted an abuse of discretion, we 'view the entire record in the light most favorable to the court's ruling, and draw all reasonable inferences in support of it. [Citation.] We also defer to the trial court's credibility determinations. [Citation.] The trial court's decision will be reversed only "for manifest abuse exceeding the

bounds of reason." [Citation.]' [Citation.]" (*Osborne v. Todd Farm Service* (2016) 247 Cal.App.4th 43, 51.)

A terminating sanction "is a drastic penalty and should be used sparingly. [Citation.] A trial court must be cautious when imposing a terminating sanction because the sanction eliminates a party's fundamental right to a trial, thus implicating due process rights. [Citations.]" (*Lopez*, *supra*, 246 Cal.App.4th at p. 604.) Any sanction selected should be tailored to the harm caused by the discovery abuse, and it should not go beyond what is necessary to protect the interests of the party who was denied discovery. (*Ibid*.) As one court aptly explained, a terminating sanction is justified "where a violation is willful, preceded by a history of abuse, and the evidence shows that less severe sanctions would not produce compliance with the discovery rules[.]" (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279–280.) Another court determined that trial courts should not issue a terminating sanction unless, inter alia, the conduct was clear and deliberate and the client rather than the attorney was at fault. (*Del Junco v. Hufnagel* (2007) 150 Cal.App.4th 789, 799; but see *Bernstein v. Allstate Ins. Co.* (1981) 119 Cal.App.3d 449, 451 ["[I]t should be borne in mind that plaintiff 'voluntarily chose this attorney as his representative in the action, and cannot now avoid the consequences of the acts or omissions of this freely selected agent'"].)

Generally speaking, a trial court should consider the conduct of the party to determine if the actions were willful; the detriment to the propounding party; and the number of formal and informal attempts to obtain the discovery. (*Los Defensores, Inc. v. Gomez* (2014) 223 Cal.App.4th 377, 390.) With this in mind, we turn to our analysis.

Though discovery in this case was contentious, Bral did appear for three days of deposition. His deposition was suspended based on an agreement between counsel to resume at a future date so Bral could produce more documents. The evidence from Chapman indicates that he did not tell Bral of the order directing him to appear for his continued deposition on June 22, 2016. Also, Whelan represented to the trial court on August 22, 2016, that he did not coordinate the June 22, 2016 deposition, that all discovery had been provided, and that he had offered Bral for deposition subsequent to receiving Beitler's motion. The foregoing indicated that Bral's failure to appear for his deposition and produce documents on June 22, 2016, was the fault of his attorneys, that he did not willfully disobey the trial court's discovery orders, and that he was committed to giving Beitler discovery. Notably, Beitler's counsel did not dispute that documents had been produced or that Bral had been made available for his deposition. Rather, Beitler's counsel merely stated that neither of those things was confirmed by anything in the record. That was not the same thing as a denial of Whelan's claims. Moreover, the trial court did not make a finding that a less severe sanction would be futile. Nor did the trial court find that Bral had acted in willful violation of a discovery order or that Beitler had suffered detriment that could not be ameliorated. Rather, the trial court essentially punished Bral for failing to file a declaration.

Aside from the considerations above, we note that on July 29, 2016, the trial court told the parties to resolve their discovery dispute. It suggested that if Bral's deposition was scheduled and he produced documents, then Beitler's motion could be taken off calendar. From what Whelan said at the

hearing, the trial court had good cause to believe that necessary documents had been produced and that Bral's deposition would have been scheduled, and possibly completed, but for Beitler's counsel refusal to schedule a new date.

Finally, it cannot be ignored that even though Bral had multiple attorneys, the record makes clear that Chapman was leading the litigation. Also, there is no dispute that Chapman was ill. In connection with Beitler's second motion to compel, Beitler's counsel complained about failed meet and confer attempts, and failed phone appointments. This apparently related to Chapman. Thus, there was tragedy rather than willfulness behind Bral's failures.

Based on the totality of the circumstances, we conclude that the trial court abused its discretion.

Beitler offers two arguments to persuade as to a contrary view. First, the history of the case demonstrates Bral's ongoing noncompliance with discovery and discovery orders, and he offered no evidence that his failure to appear on June 22, 2016, was not willful. Second, Bral is responsible for the mistakes made by his attorneys.

As to the first argument, Beitler relies on *Creed-21 v. City of Wildomar* (2017) 18 Cal.App.5th 690 (*Creed-21*). But that case is easily distinguishable. A pivotal issue in that case was whether plaintiff had standing to sue under the California Environmental Quality Act. After a motion to compel, the trial court ordered plaintiff to produce its person most qualified (PMQ) for a deposition and to pay sanctions. The plaintiff failed to do either. It claimed that the PMQ was unavailable due to a family emergency. The trial court imposed an issue sanction establishing that the plaintiff lacked standing to sue because

none of its evidence supported its contention that the PMQ was unavailable. (*Id*. at pp. 693–694.) In that case, there was no dispute about the plaintiff's knowledge of the discovery order. Also, the trial court imposed an issue sanction regarding standing rather than a terminating sanction. Even though the issue sanction had the effect of a terminating sanction, the sanction pertained to a discrete issue and was designed specifically to ameliorate the effect of the discovery abuse on the defendant. Thus, unlike here, *Creed-21* involved a willful violation of a discovery order and a carefully and narrowly tailored discovery sanction.

To the degree Beitler objects that Bral did not prove lack of willfulness, we fail to appreciate the point. Beitler had the burden of proving the right to the relief he requested. (Evid. Code, § 500 ["a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief . . . that he is asserting"].) In other words, Bral was not required to disprove Beitler's claims.

As to the second argument, it is apparent that the cases are not uniform regarding whether attorney fault should be imputed to the client for purposes of terminating sanctions. We need not weigh in on that debate and add to any split. Rather, we conclude that where, as here, the evidence establishes that the lead litigator was ill and cocounsel subsequently offered to make amends for prior discovery noncompliance, a terminating sanction should not issue absent some evidence of willful conduct by the client or obvious prejudice to the complaining party. Here, the record established neither.

DISPOSITION

The judgment is reversed.

The parties are to bear their own costs on appeal.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT